

NO. 44949-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARK MACY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Steve Dixon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in refusing to appoint counsel to represent appellant in the evidentiary hearing on his motion to withdraw his guilty plea.

Issue pertaining to assignments of error

Appellant moved under CrR 7.8 to withdraw his Alford plea, based in part on a recent recantation from the alleged victim. The court ordered an evidentiary hearing but denied appellant's request for appointed counsel. Where the newly discovered evidence, if true, would have undercut the factual basis for appellant's plea, did he raise a meritorious issue which entitled him to the assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On October 13, 2011, the Kitsap County Prosecuting Attorney charged appellant Mark Macy with second degree assault, with domestic violence and sexual motivation allegations, and felony harassment, with a domestic violence allegation. CP 1-10. On November 16, 2011, Macy entered an Alford plea, agreeing that the court could review the police reports and statement of probable cause to establish a factual basis. CP 25. At the sentencing hearing on February 3, 2012, the court imposed a sentence

of 90 months to life on the assault and a sentence of 60 months on the harassment. CP 37-38.

On January 31, 2013, Macy filed a motion to withdraw his guilty plea, with a supporting memorandum of law and affidavit. CP 54-87. Following a hearing the court denied Macy's motion, and Macy filed this timely appeal. CP 104-08, 111-12.

2. Substantive Facts

On September 15, 2011, police responded to call about domestic disturbance. They took a statement from M.D. and arrested Mark Macy. CP 7-8.

The police report from the investigation indicated that a woman had called 911, crying and asking for police. When police arrived, Macy answered the door, with M.D. standing in the background. M.D. was holding blood covered tissues, and as Macy spoke to the officers, M.D. motioned that she had been hit in the face. Police entered the house over Macy's objection to speak to M.D. CP 7. Once Macy was arrested and taken outside, M.D. said that Macy had assaulted her because he was drunk, and he was trying to force sex on her. CP 7-8. She said that when she ignored Macy's advances, he became enraged and said he would kill her and throw her into the river. Then he became angrier and started hitting her. M.D. called 911 when Macy left the room, and she said that Macy was just

about to rape her when the police arrived. CP 8. Macy entered an Alford plea based on the information in the police report. 1RP¹ 8-9.

Prior to sentencing, Macy informed his attorney that he wanted to withdraw his plea. Independent counsel was appointed to advise him on the issue, and Macy decided to proceed with sentencing. 1RP 11; 2RP 2-5; 4RP 2.

Ten months after Macy was sentenced, M.D. executed an affidavit, stating that she was under duress and under the influence of alcohol when she spoke to the police, which impaired her ability to be forthright. CP 52. She had recently seen the police report, and she felt it necessary to correct the factual errors it contained. CP 52.

M.D. said in her affidavit that she had several drinks on the evening in question, after which she and Macy got into a minor scuffle, and she tripped and fell into a wall, which caused her nose to bleed. CP 52. Macy tried to help her, but instead she called 911, saying she was in fear for her life, which was not true. When the officers arrived, she was scared, because she should not have called them, so she continued with her statement. M.D. said the officer coerced her into a statement that was not true. She said that

¹ The Verbatim Report of Proceedings is contained in eight volumes, designated as follows: 1RP—11/16/11 and 1/27/12; 2RP—12/15/11; 2RP—12/20/11; 4RP—12/29/11; 5RP—1/3/12; 6RP—2/3/12; 7RP—3/8/13; 8RP—4/26/13.

the truth is that Macy never made any sexual advances toward her that evening. CP 52.

Macy then filed a pro se motion to withdraw his guilty plea. In it he argued (1) that his Alford plea was not supported by a factual basis, since M.D. had recanted her allegations; (2) that the plea agreement was invalid as it was negotiated on the false premise that the State would file more serious charges if he did not plead guilty; and (3) that the plea was involuntary because he received ineffective assistance of counsel. CP 54-57. Macy requested an evidentiary hearing, arguing that his motion was meritorious and required the resolution of factual issues. CP 57.

In an affidavit filed in support of his motion, Macy described the events which culminated in his arrest, as well as his understanding of the investigation, plea negotiations, and representation by appointed counsel. CP 58-64. He also filed a memorandum of law, noting that the factual basis for his guilty plea was the police report of M.D.'s statements, which she had since recanted. CP 65-67. He argued that his decision to enter the Alford plea was based on misinformation, rendering his plea involuntary. Because M.D. had recanted her allegations, there was no factual basis to support his plea. CP 68-70. Macy further argued that the State knew of the recantation before he entered his plea and therefore had no evidence to support the charges against him or more serious charges, and defense counsel failed to

adequately investigate. CP 71, 75, 76. Macy requested a hearing on several grounds, including whether the factual basis for the plea was sufficient in light of M.D.'s recantation. CP 79.

The court agreed that an evidentiary hearing was required and had Macy transferred from prison for the hearing. 7RP 4; 8RP 2. The court did not appoint counsel to represent Macy, however. At the hearing, Macy explained that he was unprepared to proceed because he had not been permitted to bring his legal documents with him when he was transported to court, and he needed an attorney to represent him. 8RP 2-3. The court stated that it was not obliged to appoint an attorney for a post-trial proceeding unless it found the motion meritorious. It directed Macy to proceed with presenting evidence and arguing his motion. 8RP 3-5.

Macy then called his father as a witness, who testified that M.D. was drinking alcohol on the night of the alleged crime and was completely intoxicated. 8RP 7. Macy explained that he wanted M.D. to testify, but he did not understand that he could subpoena her from prison. 8RP 10.

The court denied Macy's motion to withdraw his guilty plea. It found there was a factual basis in the record to support the plea, and M.D.'s recantation was not a basis for withdrawing the plea, because there was no more reason to believe her recantation rather than her original statement. 8RP 11. Moreover, it concluded that nothing in the record suggested that

the prosecution had overstepped its bounds or that defense counsel had provided ineffective assistance. 8RP 11.

C. ARGUMENT

MACY RAISED A MERITORIOUS ISSUE IN HIS MOTION TO WITHDRAW HIS GUILTY PLEA, AND THE COURT SHOULD HAVE APPOINTED COUNSEL TO REPRESENT HIM AT THE EVIDENTIARY HEARING.

Macy moved to withdraw his guilty plea pursuant to CrR 7.8. Under that rule, “the court may relieve a party from final judgment” based on “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5.” CrR 7.8(b)(2). While a defendant does not have an automatic right to appointed counsel when he moves to withdraw a guilty plea post-sentencing, counsel should be appointed if the motion is not frivolous. State v. Robinson, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). The Supreme Court in Robinson interpreted CrR 7.8 “to provide counsel after an initial determination has been made that the motion is not frivolous much like the procedure used to appoint counsel in PRPs.” Id. Macy’s motion to withdraw his guilty plea based on newly discovered evidence under CrR 7.8 is not frivolous because, if believed, the new evidence undercuts the factual basis for the plea. Therefore, counsel should have been appointed to represent him.

A defendant is entitled to a new trial on newly discovered evidence if he establishes that the evidence “(1) will probably change the result of the trial, (2) was discovered since the trial, (3) could not have been discovered before the trial by exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching.” State v. Scott, 150 Wn. App. 281, 294, 207 P.3d 495 (2009) (quoting In re the Personal Restraint of Brown, 143 Wn.2d 431, 453, 21 P.3d 687 (2001)). The Court of Appeals reviews for abuse of discretion the superior court’s decision denying a motion for vacation of judgment and a new trial. Scott, 150 Wn. App. at 290. The superior court abuses its discretion when its decision is manifestly unreasonable, based on untenable grounds, or based on untenable reasons. Id. (citing State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004)).

“A witness or victim’s recantation of earlier statements is generally considered new evidence.” Scott, 150 Wn. App. at 294. Before the superior court considers a defendant’s motion for a new trial based on recantations, the court must determine whether those recantations are credible. Scott, 150 Wn. App. at 294 (citing State v. Macon, 128 Wn.2d 784, 804, 911 P.2d 1004 (1996)).

In Scott, the defendant entered an Alford plea and was sentenced. He later filed a motion to vacate the plea, supported by declarations from the alleged victim and other witnesses recanting their earlier statements.

Scott, 150 Wn. App. at 286-87. Counsel was appointed to assist him, filing memoranda in support of the motion to vacate and additional new evidence. Id. at 287-88. The superior court heard oral argument on the motion but did not hold an evidentiary hearing to determine whether the new statements were credible. Id. at 289. Instead the court concluded that the newly discovered evidence did not justify vacation of the guilty plea, because it did not demonstrate that the witnesses' original statements were untrue. Id. at 289-90. On appeal, this Court held that an evidentiary hearing on the credibility of the recanting witnesses' statements is required where, if true, the recent statements prove the defendant did not commit the crime for which he entered an Alford plea, based on earlier statements to the contrary. Id. at 295-98.

As in Scott, the recantation evidence in this case, if believed, satisfies the criteria for withdrawing the guilty plea and granting a new trial. M.D. said in her affidavit that she injured her nose falling into a wall and that Macy never made any sexual advances. CP 52. This evidence would probably change the result, because it contradicts and significantly calls into question the evidence used to provide a factual basis for Macy's Alford plea. The new evidence was also discovered after Macy's conviction, and given the court order prohibiting contact, there is likely nothing Macy could have done to obtain the evidence sooner. Moreover, the evidence is material and

not merely impeaching or cumulative because, if believed, it strongly indicates that Macy did not commit a crime. Thus, an evidentiary hearing was necessary to determine the credibility of the new evidence. See Scott, 150 Wn. App. at 296-98.

The court below recognized that an evidentiary hearing was required based on the issues raised in Macy's motion. 7RP 4. It denied Macy's request for counsel, however, saying it only had to appoint counsel if it found the motion had merit, which it would determine based on the evidentiary hearing. 8RP 3-5.

The court proceeded with the hearing, despite Macy's explanation that he was unaware he would have to represent himself and that he had not even been permitted to bring his paperwork with him when he was transported from prison. 8RP 2-3. Macy referred the court to the newly discovered evidence in M.D.'s affidavit, and he called his father as a witness to testify that M.D. had been intoxicated on the night in question. 8RP 4, 7. Macy had not subpoenaed M.D. however, believing he would have counsel to do that. 8RP 6, 10. The court then concluded that the issue Macy raised was not meritorious because there was no reason to believe M.D.'s recantation over her prior accusations. 8RP 11.

The court appears to have confused the threshold question of whether the motion raised a meritorious issue with the ultimate

determination on the merits. The evidentiary hearing was necessary because if the recantation evidence was credible, Macy would be entitled to withdraw his plea. Macy should have been represented by counsel at that crucial hearing. See Robinson, 153 Wn.2d at 696 (interpreting CrR 7.8 to provide for counsel after initial determination that motion is not frivolous); Scott, 150 Wn. App. at 295 (evidentiary hearing to evaluate continued reliability of factual basis for guilty plea is “all the more critical where a defendant’s conviction is based on an Alford plea [where the defendant does not admit guilt] rather than on his admission or sworn trial testimony.”)

The court’s failure to appoint counsel to represent Macy was not harmless error because there is a reasonable likelihood that the error materially affected the outcome of Macy’s motion. See Robinson, 152 Wn.2d at 697 (quoting State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

Because Macy did not have the assistance of counsel, the court did not hear from M.D. in person and had insufficient evidence to make the crucial credibility determination. The point of the evidentiary hearing is to allow the court to interview the recanting witness in person to determine the reliability of her recent recantation and thus the continued reliability of the factual basis for the guilty plea. See Scott, 150 Wn. App. at 293-94. Macy did not know that he would not be represented and was not prepared to

present evidence at the evidentiary hearing. He wanted the court to hear from M.D., but he did not know he could subpoena her from prison. With appointed counsel prepared to fully represent Macy, there is a reasonable likelihood the outcome of the motion would have been affected. The court's error was therefore not harmless. The order denying Macy's motion to withdraw his plea should be vacated and counsel should be appointed to represent him on remand.

D. CONCLUSION

Macy's CrR 7.8 motion was not frivolous, and counsel should have been appointed to represent him at the evidentiary hearing. This Court should vacate the order denying his motion to withdraw his guilty plea and remand with instructions that counsel be appointed to represent him.

DATED June 6, 2014.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

A handwritten signature in dark ink, appearing to read "Catherine E. Glinski", written in a cursive style.

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